

2. The APA Requires That Wholesale Rule Changes Be Made By A Public Notice and Comment Rule Making

MCI argues that the Commission should establish new payment plans for all C Block licensees through its waiver process to avoid a "drawn-out" process.<sup>46/</sup> However, the length of a Commission proceeding is not the benchmark for determining whether to use a waiver process or a rule making proceeding. Rather, the Commission must determine whether the proposed changes are to rules of general applicability or to rules specific to an individual applicant.<sup>47/</sup> Where the Commission has established rules through a rule making process, it can only change those rules through a rule making proceeding.<sup>48/</sup>

In this case, MCI and the PCS Licensees propose modifications that would apply to numerous licensees. A waiver is not the proper procedure where "the relief requested would involve a fundamental change in the rule itself rather than the creation of a limited exception due to particular unique circumstances or other considerations which make application of the general policy of the rule inappropriate."<sup>49/</sup> As the courts have stated, "the very essence of waiver is the presumed validity of the general

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<sup>46/</sup> *Id.* at p. 3.

<sup>47/</sup> Memorandum Opinion and Order, 3 FCC Rcd 4690 (1988) at 4692.

<sup>48/</sup> *American Federation of Government Employees v. FLRA*, 777 F.2d 751, 759 (D.C.Cir. 1985).

<sup>49/</sup> Memorandum Opinion and Order, 87 FCC2d 587, 593 (1981).

rule."<sup>50/</sup> In this case, the parties are challenging the rule itself; a notice and comment rule making proceeding is required to do so. Therefore, although opposed to any changes in the Commission's payment obligations, Nextel -- like Cook Inlet -- asserts that such can only be made through a notice and comment rule making proceeding.<sup>51/</sup>

**F. The Commission Should Immediately Enforce Its Financing Obligations**

If the Commission is to preserve the integrity of its auction rules, provide certainty in the marketplace, and maintain the confidence of the entities it regulates, it must immediately enforce its payment obligations on the C and F block licensees currently in default. A vast number of bidders and potential bidders relied on the integrity of the Commission's processes in making the decision to participate in auctions, in deciding how, where and when to bid, and, in some instances, in deciding to end to their auction participation. Parties were aware that their failure to make timely payments to the Commission would result in forfeiture of the licenses and a penalty. Therefore, the Commission should immediately act to enforce its financing rules by cancelling these licenses, re-auctioning them, and assessing and collecting the appropriate penalty.

Any auction debt deferral, forgiveness or restructuring for C and F block licensees would eviscerate the confidence of auction

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<sup>50/</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C.Cir. 1969).

<sup>51/</sup> Cook Inlet Petition at p. 6.

participants in the integrity of both past and future spectrum auctions by creating a new "debt forgiveness" precedent. Future bidders, in particular, would assume that their auction license debt would also be deferred or forgiven by merely sending the FCC a letter indicating they need investment help -- regardless of the underlying economic validity of their bids and business plans. Such precedent would contravene the basic premise of using competitive bidding to select among mutually exclusive applications for spectrum-based services; i.e., the Commission could no longer assume that the bidder that values the spectrum most would offer the highest bid if winning bids could be subsequently modified.

The Commission has conducted spectrum auctions for PCS and other spectrum-based services in an exemplary manner, completing the auction and service rules in timely fashion and granting licenses in a effective and efficient manner. The speed and effectiveness of the auction process has instilled confidence in potential bidders and investors as to the integrity and reliability of the Commission's rules and regulations. The Commission should be commended for its outstanding efforts. Granting the requested debt relief, however, would shatter the industry's confidence in the Commission and the integrity of its rules, and thereby create significant uncertainty for all potential bidders and investors.

#### IV. CONCLUSION

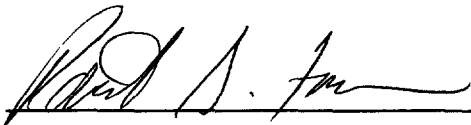
The Commission established special financing provisions for designated entities, including the obligation to make timely payments or -- after a 90 day grace period -- forfeit the license.

The Commission and the PCS licensees were well aware of the competitiveness of the industry and the evolution of the marketplace. To protect the integrity of the Commission's processes and provide certainty to the financial markets, the Commission should enforce its rules, cancel licenses when obligations go unfulfilled, and re-auction them.

For these reasons, Nextel respectfully requests that the Commission enforce its auction rules and deny the requested waivers.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I, Rochelle L. Pearson, hereby certify that on this 23rd day of June, 1997, I caused a copy of the attached Comments of Nextel Communications, Inc. to be served hand delivery and first-class mail, postage prepaid to the following:

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